

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: June 15, 1992

FAA Order No. 92-37

In the Matter of:
SALVATORE GIUFFRIDA

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)
) Docket No. CP91EA0289
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)

DECISION AND ORDER

Respondent Salvatore Giuffrida ("Respondent") has appealed from the oral initial decision issued by Administrative Law Judge Burton S. Kolko at the conclusion of a hearing held on December 3, 1991, in New York, New York.^{1/} In his initial decision, the law judge reduced the civil penalty sought by Complainant from \$1000 to \$500, for Respondent's violation of Section 121.317(h) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 121.317(h).^{2/} The law judge reduced the civil penalty based upon his finding that Respondent is unable to pay the fine sought by Complainant. He ordered that Respondent could, if he wishes, pay the \$500 civil penalty in 10 monthly installments of \$50.00 each.

^{1/} A copy of the law judge's oral initial decision is attached.

^{2/} Section 121.317(h) of the FAR provides that "[n]o person may smoke in any airplane lavatory." 14 C.F.R. § 121.317(h) (1989).

On August 2, 1989, Respondent and his family were passengers on Tower Air Flight 733 from Rome, Italy, to John F. Kennedy International Airport, New York. During the flight, the flight attendant instructed Respondent that smoking was not allowed in the aircraft lavatory or while standing.^{3/} Nonetheless, Respondent was found smoking in the cabin and in the lavatory.

When Respondent failed to answer the complaint, Complainant moved to have the facts of the complaint deemed admitted, and to limit the hearing to the issue of sanction. Respondent did not reply to that motion, and the law judge granted it.

The only witness at the hearing was Frederic Stein, an Aviation Safety Inspector for the Federal Aviation Administration. He testified about the fire hazards associated with smoking in aircraft lavatories, and opined that a \$1000 civil penalty was reasonable.

^{3/} Section 121.571(1)(i) of the FAR, 14 C.F.R. § 121.571(1)(i) (1989), provides that "[e]ach passenger shall be briefed on when, where, and under what conditions smoking is prohibited The briefing shall also include a statement that Federal law prohibits tampering with, disabling, or destroying any smoke detector in an airplane lavatory." From this record, it cannot be determined whether the flight attendant gave Respondent a warning individually, in addition to the required pre-takeoff briefing. However, the standard pre-takeoff briefing alone should constitute more than adequate notice of the prohibition against smoking in lavatories at any time.

Although Respondent did not appear at the hearing, the law judge admitted a letter that Respondent had sent to the law judge shortly before the hearing. The law judge explained that ordinarily he would consider a respondent's failure to appear at a hearing as a waiver of the request for hearing, and would affirm automatically the civil penalty sought in the complaint. However, in this case, he stated, he would not enter a default judgment, but would consider Respondent's letter.

In this letter, Respondent explained, with the assistance of his wife, that:

[W]e were travelling with a colicky infant and a restless toddler ... so it's possible we missed part of the announcement that was made by flight attendants about smoking. We also don't recall the announcement about smoking being made in Italian.

Mr. Giuffrida had limited comprehension of English at the time so he wouldn't have understood any announcements (sic) anyway.

Exhibit 1. Respondent, who apparently was seated in the no smoking section, could not find a seat in the smoking section, and as a result, he went to the lavatory to smoke. Respondent wrote that he did not know that this was dangerous or a violation of any regulation.^{4/} Respondent wrote further:

^{4/} The law judge made no findings regarding Respondent's alleged lack of notice that smoking was prohibited in the lavatory. In light of the resolution of this appeal, it is not necessary to determine whether this allegation is true, and if so, whether it constitutes a mitigating factor.

(Footnote 4 continued on next page.)

This fine is too high for us to pay as our combined income is about \$350 a week and our rent and utilities are about \$900 a month. We have 2 children to support. Mrs. Giuffrida is attending school full time so she can't help out with the expenses. We simply have no extra money to pay a fine of any amount.

Exhibit 1.

The law judge held that this violation warranted a \$1000 civil penalty. Relying upon Respondent's letter, he reduced the civil penalty to \$500, payable in 10 monthly \$50 installments.

On appeal, Respondent only challenges the amount of the sanction, arguing that he cannot afford to pay \$500, even if it is payable in 10 monthly installments. He asserts that "I am willing to pay a reasonable amount, which for me would be

(Footnote 4 continued from previous page.)

Nonetheless, it is hard to believe that any passenger, even one whose understanding of English is limited, would not know that smoking is forbidden in aircraft lavatories. Passengers are informed of this rule during the pre-takeoff briefing (see footnote 3 supra). In addition, "No Smoking" or "No Smoking in Lavatory" placards must be located conspicuously on each side of the entry door. 14 C.F.R. § 25.855(f) (1989). Section 25.855(f) also provides that "[a] 'No Smoking' symbol may be included on the placard." Id. Passengers may also learn about the prohibition against smoking in lavatories by reviewing the printed information cards that supplement the oral briefings. 14 C.F.R. § 121.571(b) (1989); Advisory Circular 121-24A, Passenger Safety Information Briefing and Briefing Cards (5/8/89). The FAA encourages carriers to use international symbols to depict actions in these placards. Id. Thus, it is likely that the printed information card and the placards on the lavatory door used the no smoking symbol. Also, it is required that each lavatory be equipped with a sign or placard that reads "Federal law provides for a penalty of up to \$2000 for tampering with the smoke detector installed in this lavatory." 14 C.F.R. § 121.318(e) (1989).

about \$10 per month." Appeal Brief at 1. Complainant argues that a further reduction cannot be justified based upon the "unsupported and undelineated declarations of [Respondent's] total monthly income and expenses." Reply Brief at 4.^{5/}

The only issue on appeal here is whether the civil penalty, as reduced by the law judge, is appropriate. Smoking in an aircraft lavatory poses such a serious risk to safety^{6/} that ordinarily a \$1000 civil penalty is warranted. However, it has previously been held that "financial hardship, when proven, can serve as a basis for a reduction in sanction." In the Matter of Lewis, FAA Order No. 91-3 at 9 (February 4, 1991). Respondent has provided sufficient information to justify an even further reduction of the penalty to \$200. Respondent's income is about \$1400 a

^{5/} Complainant asserts that its failure to appeal from the initial decision should not be interpreted as a concession that the law judge has the authority to order installment payments. Complainant also states that its failure to appeal does not mean that it agreed with the law judge that there was sufficient evidence warranting a reduction of the civil penalty to \$500.

^{6/} On July 11, 1973, a fire broke out in the aft lavatory on an aircraft owned by Varig Airlines. As a result, 124 of the 135 persons on board died due to asphyxiation or to the effects of toxic gases produced by the fire. United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 799-800 (1984) ("Varig Airlines"). On June 2, 1983, 23 people died due to a fire that started in a lavatory on board an Air Canada flight near Cincinnati, Ohio. TR. 7; Final Rule, Airplane Cabin Fire Protection, 50 Fed. Reg. 12726, 12727 (1985). Although the FAA has taken numerous measures to protect against fires, the best protection remains the prevention of fires.

month out of which he pays about \$900 a month for rent and utilities. That leaves about \$500 for all other expenses for a family of four. Under the circumstances, a \$200 civil penalty would be adequate to deter Respondent from smoking in a lavatory again.

THEREFORE, Respondent's appeal is granted, and a civil penalty in the amount of \$200 payable in 10 monthly installments is assessed.^{1/}



BARRY LAMBERT HARRIS
Acting Administrator
Federal Aviation Administration

Issued this 12th day of June, 1992.

^{1/} Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1991).